***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLEE

74-1411

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P/S

To be argued by
STANLEY L. KANTOR

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel. :
ROBERT McCOY,

Petitioner-Appellant, :

-against- :

J. EDWIN LaVALLEE, Superintendent, :

Respondent-Appellee. :

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# BRIEF FOR RESPONDENT-APPELLEE

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## Preliminary Statement

Petitioner-appellant['Petitioner'] has appealed from a decision of the United States District Court for the Southern District of New York (Ward, J.) denying, without a hearing, petitioner's application for a writ of habeas corpus and dismissing the petition. On March 21, 1974, the District Court granted petitioner's application for a Certificate of Probable Cause, and a Notice of Appeal was filed the same day. By order dated April 8, 1974, this Court assigned counsel and established a briefing schedule.

## Questions Presented

1. Was petitioner denied due process by the admission in evidence of a pre-Stovall showup and an in-court identification where the witness had ample opportunity to observe his assailant under circumstances designed to indelibly impress the visage on his memory?

2. Do petitioner's mere assignment of errors -- failure to permit him to take a lie detector test and failure to make a preliminary ruling on suppressions of prior convictions rise to the level of a constitutional deprivation?

## Statement of Facts

Petitioner is incarcerated as a result of a conviction in Supreme Court, New York County (Tierney, J), of counts of murder in the first degree and attempted murder in the first degree. Petitioner is serving as a result of these convictions, concurrent sentences of life imprisonment on the first count and 12 1/2 years to twenty-five years on the second count. Upon conviction an appeal was taken to the Appellate Division, First Department, which affirmed without opinion, People v. McCoy, 33 A D 2d 533 (1st Dept. 1969) and to the New York Court of Appeals which also affirmed, People v. McCoy, 27 N Y 2d 990 (1970).

A. The Crime

The crime of which petitioner was convicted arose out of the events of May 27 and 28, 1966.

In the evening hours of May 27, 1966, two men, both of whom were to become victims, Lonnie Chambliss and Malachi Jackson, left a rooming house located at 201 West 87th Street in Manhattan for an evening's pleasure (325-326).* In the course of the evening Chambliss and Jackson visited two bars, one described as a "Latin place"; and the other being a "gay" bar (328-30, 371-3), and during the ensuing three to three and a half hours, Chambliss consumed two glasses of wine and two mixed drinks (371-3).

After the two men left the bars, they walked toward 88th Street and Columbus Avenue, where they met petitioner. Jackson, who apparently knew petitioner, introduced him to Chambliss as one "Johnny". Introductions having been made, Jackson suggested that the three of them, Chambliss, Jackson and the murderer, retire to Jackson's room for some drinks, whereupon petitioner agreed, saying "Fine, because I have



* Numbers in parentheses, unless otherwise indicated, refer to the pages of the trial transcript submitted below.

reefers" (340-1). The three men then walked the two blocks from 88th Street and Columbus Avenue to Jackson's room on 87th Street and Amsterdam Avenue (344-6, 369-70).

Upon arriving at Jackson's room on the fourth floor of the rooming house, Chambliss and petitioner, each sat down in chairs approximately seven feet apart. As Jackson prepared drinks for them, Chambliss smoked "half a stick" of marijuana (348, 363, 370-1). Chambliss remained in the room for approximately fifteen minutes, finishing his drink and his cigarette. Then, he excused himself and went downstairs to his room, two floors below, to put away his umbrella and raincoat. Petitioner followed him out of Jackson's room and headed toward the bathroom (438). Chambliss remained in his room for approximately three minutes and then returned to Jackson's apartment (349-50, 363, 374).

Upon returning, Chambliss discovered Jackson there alone, resumed his chair and had a discussion with Jackson (458). Approximately 3 or 4 minutes after returning, a toilet flushed and then now wearing glasses, petitioner came back from the bathroom and entered Jackson's room, closing the door behind him (459-60). After entering the room, petitioner drew a gun

and said, "This is a holdup", to which Jackson innocently replied, "You've got to be joking". Petitioner, apparently to prove that he was neither joking nor to be trifled with, picked up a knife and ordered the two men to "stand up". Chambliss and Jackson, apparently convinced of petitioner's sincerity, complied with the order, but then Chambliss was told to "sit down" (460, 573-4). Petitioner then ordered Jackson to undress and to "get on the bed". Chambliss, sitting in a chair, observed all of this (460-1). Jackson having complied with petitioner's commands, petitioner then turned his attention to Chambliss, ordering him to undress which he did (461-2). Then petitioner ordered Chambliss to turn over his gold watch. Chambliss did (462).

Not content with merely having his intended victims in a state of total nudity, and, apparently to guarantee his subsequent escape, petitioner had Chambliss pour two glasses of whiskey and then ordered both Chambliss and Jackson to swallow what petitioner though were two sleeping pills and drink the whiskey (463, 546-50). When these orders were complied with, petitioner ordered Chambliss on to the bed and told Jackson to tie him up (466-7).

As Chambliss lay on the bed, lying on his stomach, his hands tied behind his back, he was able to make observations out of his subsequently useless left eye (468, 575-84). After tying Jackson and gagging Chambliss, Jackson pleaded with petitioner not to gag him because he had claustrophobia (468, 476, 574-6). Petitioner then told Jackson to keep quiet, and, after Jackson refused, petitioner said, "You want me to knock you out?" Thereafter, petitioner struck Jackson on his temple with his fist. Jackson then became silent (469-70).

Petitioner, no longer burdened with protestations from his intended victims, proceeded to examine his victims' trousers (471). After completing his task, petitioner ordered Chambliss to turn his head away, and proceeded to beat Jackson (471). Then, Chambliss heard the crash of a bottle breaking, the "beating of a pot", and a boot heel striking against Jackson's head. Chambliss then felt a warm, sticky fluid running underneath him (471-73).

Petitioner, then turned Jackson, who had been face up. over so that he was lying on his stomach, and mounted him (474). Petitioner had, at some point previously, removed his trousers and underclothes, so that he was only wearing a

shirt (474). Chambliss then felt the bed going up and down (474). After the up and down motion stopped, petitioner again turned Jackson over, so that he was again face up (474-5). Chambliss then heard some more beating, the sound of glass breaking and the ripping sound of something being cut with a dull edge (475). The cutting sound was coming from the area of Jackson's head (475). Chambliss then heard Jackson, who had been panting, give out a moan and then there was silence (476-7).

Petitioner then put on his trousers and walked around the side of the bed where Chambliss was lying, picked up Chambliss' head by his forelocks and then, in Chambliss' words (477-8):

> ". . .When he grabbed me this time he stabbed me up here, right along up here, above my ear (indicating).
>
> Q. You are indicating along the left ear, is that correct? A. Yes.
>
> Q. What happened then? A. And then, after he did that I went (unintelligible sounds) and held my head down like that (indicating) pretending I was asleep. Then he grabbed me again and pulled my hair back and stabbed me underneath the neck and cut me across here (Indicating)."

Chambliss was unable to see what he was stabbed with, because his eyese were shut.

Petitioner, now apparently satisfied with a job well done, then simply opened the door and walked out (480).

After remaining in the bed for some additional minutes, Chambliss, still nude and still bound, got up, went to the door, opened it and walked out into the hall, attempting to get help from others on the floor (481-2). Failing, he walked down a flight of steps, got on the elevator, descended to the lobby, went out into the street and screamed for help (482-3). A passerby, standing on the far corner of the intersection, apparently hearing the screams, pulled the fire-alarm box (482, 483-5). Shortly thereafter, a patrol car came down the street, saw Chambliss and took him to the hospital (191-203, 486, 599-600). At St. Luke's Hospital Chambliss was treated for his injuries, and his binds were cut (194-5). After treatment, Chambliss was released from the hospital (729-32). At all times he was ambulatory, had his faculties about him and appeared not to be intoxicated (669, 729-32).

The detectives assigned to the case, Smith and O'Rourke, interviewed Chambliss at the hospital. Based on this interview, they then proceeded to Room 412 at 201 West 87th Street, where they discovered the body of Malachi Jackson (639).

Without going into the somewhat grim and gory details of the condition of Jackson's body, there evidence indicated that Jackson's throat had been cut, resulting in the severance of two major arteries and the jugular vein. That the wound was three inches wide and extended from the left side of his Adam's apple to the right side of his neck. There was also evidence of sexual abuse.

Also found in the dead man's room were men's clothing, a wallet with no money but with Jackson's papers in it, a broken whiskey bottle, with numerous shards of glass, and a pair of sunglasses.

A short time subsequent to the incident, the surviving victim, Lonnie Chambliss, went over the incident with a police artist and gave the police a description of his assailant, petitioner. As a result of the description, a composite sketch of petitioner was made.

On July 10, 1966, petitioner was arrested at 67 West 105th Street in Manhattan and brought to the precinct. There he was viewed by Chambliss in a showup and identified as the "Johnny" who assaulted him and killed Malachi Jackson.

B. The Wade-Gilbert-Stovall Hearing

Prior to permitting Chambliss to testify that "Johhny", the man he met for the first time on the morning of May 28, 1966, was in fact petitioner, Robert McCoy, the Court held an inquiry into the basis for his identification -- a so-called Wade-Gilbert-Stovall hearing (332-338). While the Court placed the burden of "going forward" on petitioner, the prosecution, as with all other aspects of a criminal trial had the burden of proof (335). The hearing, of course, was out of the jury's presence (337).*

On direct examination by the prosecution, Chambliss testified as to the circumstances surrounding his initial confrontation with petitioner, that he was introduced to him by Jackson, shook hands with him and exchanged brief pleasantries on the street corner (339-340, 343). The three of them,Jackson, Chambliss and petitioner then retired to Jackson's room, walking there together (340-1). The three men rode up the elevator together, the elevator being approximately 3 1/2-4 feet by 4 1/2-5 feet (341, 344-346). Upon arriving at the fourth floor of the building, Jackson opened the door to his room and the



* In accordance with the manner approved by this Court in U.S. ex rel. Phipps v. Follette, 428 F. 2d 912, n. 1 at 914 (2d Cir. 1970), although two years before Phipps was decided.

three men went inside (346-7). Chambliss sat down in one chair while petitioner sat in another, the two men facing each other (347). Chambliss further testified that he and petitioner were only seven feet apart, and that Chambliss sat there with petitioner for approximately 15 minutes (347-349). Then, Chambliss having finished a drink and smoked half a marijuana cigarette left and went down to his room two floors below, to put away his raincoat and umbrella, remaining there approximately three minutes and then returning to Jackson's apartment (349-350).

Upon returning to the Jackson apartment, Chambliss found Jackson there alone. As he sat there conversing with Jackson, Chambliss heard a toilet flushing and saw petitioner come into the room, now wearing horned rim glasses, closed the door and announced his intentions (350-3). Petitioner remained in the room until a few minutes before the 4:38 alarm was sent (354).

Chambliss then testified that after petitioner left the room on the evening of the incident, he next saw him in the station house, some six weeks later (354-5). Prior to that time, however, he identified no other person as the individual "Johnny" although he did appear at the precinct after the incident, gave the police a complete description and worked with the police artist in making up a composite sketch (359-361).

On cross-examination, it was brought out that while petitioner's face was, at the time of trial, scarred and his nose disfigured, these aspects of his face were not noticed by Chambliss at the time of the incident or when he was shown up in the station house (385, 400); that although he described his assailant educated and well-spoken, this was because he was well dressed and spoke so that he could be understood (414-417); that when he was called to come to the station house, he was not told why, but merely to just come (392), and did not know why (394); that when he arrived he was only told that they wanted him to look at a suspect (396), he was not told that the suspect was the one in the Jackson killing (396), and indeed, did not learn anything at all from the police about this suspect (397).

He further testified that when shown McCoy, he viewed him through a one-way mirror for a total of ten minutes, but did not identify him until the police ". . .had him stand up erect in front of a glass. Then had him turn on the side. And after he did that, that is when I identified him." (402-405). A voice exemplar was taken in Court* and Chambliss identified petitioner's voice as the same voice he heard "Johnny" use on the night of the incident (425-427).



* At petitioner's counsel's request. No voice exemplar was taken at the police station.

At the conclusion of Chambliss' testimony, petitioner declined to put any additional witnesses on the stand. The Court, after considering the record, denied petitioner's motion and stated (436-7):

> "The court finds from the facts addressed that the People have established by clear and convincing evidence that the witness Chambliss had ample opportunity to observe the person who was with him and the deceased in the deceased Jackson's room on May 28, 1966, and he is therefore qualified to make an in-court identification of the defendant as that person.
>
> Of course the weight to be given this in-court identification and its intergrity is for the consideration of the jury. The court is merely ruling now preliminarily pursuant to request on the anticipated in-court identification of the defendant by this witness.
>
> In so ruling the court expressly finds, after a hearing, that the expected in-court identification is based upon the observations of the defendant other than the show-up identification which was employed in this case." (436-7).

C. The Trial

As a result of the grand jury indictment dated July 21, 1966 for the crimes of murder in the first degree, and attempted murder in the first degree, trial was had in Part 33 of the New York County Supreme Court on January 3, 1968 (1, 47-8).

Prior to the selection of the jury, the Court and counsel for the respective parties, held a conference at which petitioner's counsel made, what counsel termed, several "requests" (2). The first of these was that the Court grant a preliminary ruling on which, if any, of petitioner's prior convictions would be used to impeach him, should he elect to testify (2-5). The Court refused to issue any such preliminary ruling, stating that once he takes the stand the witness, like any other witness, he places his credibility in issue, and can be cross-examined on his prior convictions as well as other prior bad acts (5). The Court further stated (6):

> "And to possibly assist you in your thinking on that subject, the Court is inclined to allow latitude to the District Attorney in his cross-examination of the defendant who becomes a witness, if he does become a witness. And once he becomes a witness, then he has changed his status."

While the Court denied the preliminary motion, it stated that at the appropriate time, counsel could renew the application, and it would be considered, apparently as to each specific item on his "yellow sheet" (6-7). The record is silent as to whether or not any such specific applications were made.

Counsel then asked that when any statements made by a witness to the District Attorney, police officer or grand jury are turned over to the defense, it be done out of the presence of the jury (7-8). The Court granted that application, noting only, at the prosecutor's request, that it be done on the record and that the items be marked for identification (7-8).

A colloquy was then had on the production of all police forms (UF 61's and DD5's) bearing on this case. A lengthy discussion was had on the matter and eventually those forms which had substantive information on it would be turned over (9-13, 70-76, 92-109). The prosecution was also asked by defense counsel to elect as to either felony-murder or murder by premeditation. The prosecution refused to so elect and the Court sustained him (13-16).

Counsel, then to preserve the record, argued on due process and equal protection grounds, that the Court should permit petitioner to take a polygraph test, which could be used by counsel as an investigative tool,* and that, moreover, they would urge that a lie detector was now sufficiently reliable to enable it to be put in evidence (16-19).** The Court denied the application (19). Other preliminary matters, including arrangements for the Wade-Gilbert-Stovall hearing were also disposed of at this time.

The jury was then selected, instructed and the District Attorney opened (92-117).

After the introduction by Mr. Farrell, the District Attorney's civil engineer, who drew and introduced charts of the scene (117-141); and Detective Richard Collier, who took and introduced photographs of the scene (142-180), the prosecution called Jack Deutsch, one of the victim's neighbors, who testified that on the morning of the incident he was awakened by a loud phonograph and some hollering coming from Jackson's room (183-184).



* In what fashion a polygraph examination could be used by defendant on himself, as an "investigative tool" was not then, nor has ever been made clear.

** But see People v. Leone, 25 N Y 2d 511 (1968).

Shortly afterwards, he heard a rap on his door, opened it and saw Lonnie Chambliss standing in the hallway, nude, with blood on him (184-5). He shut and locked his door and tried to go back to sleep. He was unable to. The next morning he saw blood smeared on this door (185).

A fireman, James Lee, was also called. Lee testified that at 4:38 A.M. on the morning of May 28, 1966, his company answered a fire alarm on 87th Street and Amsterdam Avenue (186-187). Upon arriving at the scene, the company looked around, discovered no fire, returned to the firehouse and filed a false alarm report (187-189).

Then the prosecution called Patrolman Fred Schiele of the 24th precinct. The officer testified that he and his partner Philip Johnson, were assigned to radio motor patrol on the 12:00 to 8:00 A.M. shift on the morning of May 28, 1966 (190-191).

At approximately, 4:40 A.M. on that morning, they were cruising westbound on 87th Street, heading toward Amsterdam Avenue. Upon reaching the intersection, Officer Schiele saw a man who appeared to be naked, with his hands behind his back

standing there. The man (Lonnie Chambliss) was bloody and screaming (191-3).

The two officers pulled over to the curb, got out of the car, and placed Chambliss in the vehicle, and took him to St. Luke's Hospital (193-4). The officer testified that Chambliss, at that time had his hands tied behind his back with a rope, that he [Schiele], could not cut it with his knife, and that all Chambliss was wearing was a cloth or towel around his neck (193-4). He was taken to the emergency room at the hospital where his binds were removed and he was worked on (195).

After speaking with Chambliss, the officer called the 24th precinct and had a conversation with the switchboard operator. He then remained at the hospital and subsequently, two detectives Smith and Moynihan of the 24th Squad, arrived (196-201).

The next witness was Eugene Griffin. Griffin testified that he had prior convictions for petit larceny (223-5, 296-317, 322-3). From September to November, 1967, he was incarcerated at the Manhattan House of Detention for Men and shared a cell with petitioner (225-7, 250-3). In September,

McCoy told him that he had been arrested on a homicide charge for the killing of two homosexuals (266-7). Subsequently, McCoy related the details of his crime. He said that at the time of the crime he had been high on drugs. He was with his victims when there was an argument over money, he went to the kitchen and picked up a knife, and he stabbed away at his victims' necks; later, he tied them up and took their money (230-1, 233). McCoy, according to Griffin, said he thought that he had killed both victims, but he later learned that only one had died and the other, though injured, was alive (231, 268). At a later date, the defendant told Griffin that he "could beat the case" because one of the main witnesses had died (233).

On the day the witness was to be transported to the New York City Penitentiary, the defendant accused him of stealing two packs of cigarettes. Griffin insisted that the cigarettes he carried were his property. The Captain of the guards divided the cigarettes between him and the defendant (259-63).

After Griffin testified, as to McCoy's confession to him, Lonnie Chambliss, the surviving victim was called to relate in vivid detail the incident of the crime (See pp. 2-8, supra) and to name the assailant -- Robert McCoy.

After Chambliss testified, Patrolman John O'Rourke was called and testified as to the condition of the scene on the morning of the murder.

After O'Rourke, came Detective Smith, who testified that on the morning of May 28, 1966, in response to a call, he went to St. Luke's Hospital, where he saw Lonnie Chambliss (637-9, 666). Chambliss did not appear to be intoxicated (669). Following a conversation, he went to Room 412 at 201 West 87th Street (639). Within the room, lying upon a bed, was the body of Malachi Torres Jackson. A pillow covered Jackson's face and there was also blood upon the body and the floor (639-40). On the floor were men's clothing, a wallet containing Jackson's papers but no money, a broken whiskey bottle, a broken drinking glass, glass fragments and a pair of eyeglasses; he smelled the odor of alcohol in the room (640-4, 656-9). There were pills on a table (640-1).

The samples of the blood he took from the scene were brought to the office of the Chief Medical Examiner, analyzed and found to be human blood (646-50).

Then Associate Medical Examiner, Dr. Michael Baden was called and testified. According to Dr. Baden, on May 28, 1966, at 6:05 A.M., he arrived at apartment 412 at 201 West 87th Street (677-80), having noticed dried blood in the elevator and in the hallway which led to the apartment (680). In the room on a bed lay the body of the deceased, nude but for a pair of black socks, lying partly on his left side and partly on his abdomen, his hands tied behind his back with a plasticized white cord. Glass fragments adhered to the skin, and a pillow was over the head. Beneath the pillow, the head was wrapped in a thick white wool sweater; numerous lacerations were present about the head (681-3, 696-7). There was a huge gaping wound on the right side of the neck with considerable dried blood present about it and upon the chest; at the scene, he could discern that the carotid artery, which supplies blood to the brain, had been severed (683). He found minor abrasions on the arms and chest (683-4). There was dried blood on the floors and walls and a broken whiskey bottle and glass fragments on the floor (680-1, 691).

The following day, he performed an autopsy on the body at the office of the Chief Medical Examiner; the body had been identified by the deceased's sister, Patrolman John O'Rourke

(who discovered the body) and a friend of the deceased (684). Upon removing the sweater from the deceased's head, he found a T-shirt tightly wound about the eyes in blindfold fashion and knotted at the back of the head; there were no tears in the T-shirt (685-6).

The doctor then described the results of his examination of the corpse. A five-inch wound, mortal under any circumstances, extended from the left side of the Adam's apple to the right side of the neck. This wound, three inches wide, extended down to the collar bone and spinal column; it cut through a major artery and two major veins; it cut deeply into the larynx and the thyroid gland (690-3, 700-1). Following the severance of the artery, the deceased could not have lived more than a few minutes, possibly less than two minutes (701).

At the top of the head were seven lacerations, three-quarters of an inch to two and a quarter inches in length (686-7). There were cuts on the eyelids and a small hemorrhage in the eye (687-8). A half-inch below the right eye was a half-inch wide laceration that extended down to the cheekbone (688). A half-inch above the right side of the upper lip was an irregular laceration that extended to the underlying bone of the upper jaw (688). The right upper lip was puffy and there was a laceration and hemorrhaging under the lip (689).

Dr. Baden found numerous superficial abrasions and lacerations on the left shoulder and left upper arm, a deep half-inch long laceration and abrasions about the right elbow (696). Inside the deceased's mouth, there were lacerations and abrasions about the tongue which apparently were caused by a blow to the mouth (698). There was material oozing from the top of the penis which was linked to some dry flaky material about the upper left thigh; a laboratory analysis revealed that the material was spermatazoa (697-9). He removed the fragments of amber colored glass which were adhering to the front and back of the deceased's chest; these fragments matched the whiskey bottle glass found on the floor of the deceased's apartment (693-5).

An internal examination of the deceased disclosed that there were no diseases present in his body (701). A quantity of alcohol in the brian tissue indicated that the deceased had drunk a moderate to a considerable amount of alcohol prior to his death. Dr. Baden found no trace of any narcotic drug, barbiturate or amphetamine present in the deceased's body (701-4).

As a result of the autopsy, Dr. Baden certified that Jackson's death was caused by multiple incised wounds of the neck, larynx, carotid artery and jugular veins, hemorrhage and shock (702).

Detective Winston DeVergee of the 24th Squad then testified. The officer testified as to the circumstances surrounding the arrest of petitioner (707-709).

After Dr. Baden and Detective DeVergee, the prosecution called Dr. Thomas Caldwell, the physician at St. Luke's Hospital, who treated Chambliss on the morning of the incident (715-8). He testified that Chambliss was treated for lacerations of the neck. The cut was three inches long and about three-eighths of an inch deep; the jugular vein was bared but not cut (719-24).* If a human being's jugular vein is cut, a third to a half of the blood supply would be lost and a state of shock would ensue (725, 727). He treated other wounds about Chambliss's face, these wounds were superficial (728-9). In Dr. Caldwell's opinion, a person who had Chambliss's wounds and received no treatment normally would not die (731-2). When admitted to the hospital, Chambliss was able to walk and had his faculties about him. Chambliss was released from the hospital when the witness finished tending to the wounds (729-32).

With the testimony of Dr. Caldwell, the prosecution's case was complete, and defendant's motions were made and denied by the Court.



* A 1/16" sheathing around the jugular vein, had however been cut.

Petitioner's first defense witness was an Attica inmate, Herbert Robertson (743). He further admitted that he considered himself a "con man" (762). He testified that for a period of time he was incarcerated at the Manhattan House of Detention for Men and while there he knew both the deferdant and Eugene Griffin, who were cell mates (745). On November 3, 1967, when Griffin was about to be transported to the New York City Penitentiary, he heard petitioner say to Griffin, "Give me my cigarettes. You took them out of the cell." Griffin replied, "I ain't giving you no cigarettes. Mother-fucker, I ain't giving you nothing" (749-51, 759). Correction Officer Hodges and other inmates were present at the time (750). Officer Hodges asked for the cigarettes but Griffin would not turn over to him (752). Hodges then sent for the Captain, who later came up to the floor (752-3). After questioning both petitioner and Griffin about the ownership of the cigarettes, the Captain took the cigarettes from Griffin (753). Following this, before leaving the floor, Griffin told the defendant, "I'm going to get you, you dirty rotten mother-fucker. I'm going to get you any way that I can" (753-4).

After Robertson, petitioner called a Manhattan House of Detention Correction Officer, one Arthur Hodges. Mr. Hodges testified that he was present when a discussion took place between the defendant and Eugene Griffin (765, 772). The defendant accused Griffin of taking his cigarettes and Griffin said, "Fuck you" or "I will fuck you" (768, 772, 775). The men were not shouting at the time (772). He took the cigarettes away from Griffin and gave them away to other inmates; he didn't know whose cigarettes they were (770-1). He did not report this incident because he did not consider it serious. He did not send for his Captain; the Captain was not on the floor to sign a log book (772-3).

At 12:42 P.M. on January 22, 1974, the case was given to the jury (931). At 6:07 P.M., the same day the jury returned from its deliberations with a verdict (947-8). The jury found petitioner guilty of first degree murder in both the common law and felony murder form and of attempt to commit murder in the first degree (948).

On April 16, 1974, petitioner was sentenced to a term of life on the murder count and 12 1/2 to 20 years on the attempted murder conviction (960).

## POINT I

PETITIONER WAS NOT DEPRIVED OF DUE PROCESS BY THE ADMISSION IN EVIDENCE OF A PRE-STOVALL SHOWUP AND IN-COURT IDENTIFICATION BY THE WITNESS WHO VIEWED THE SHOWUP.

Petitioner argues two points on this appeal concerning Chambliss' in-court identification of him as his assailant -- first, that petitioner was denied due process by the admission in evidence of the in-court identification as being tainted by a pre-Stovall showup, and second, that the admission in evidence of the showup itself, violated his due process rights. As the court below found, neither of these points are deserving of merit.

The parameters of inquiry in this type of situation have been ruled upon time and again by both the Supreme Court and this Court. Stovall v. Denno, 388 U.S. 293 (1967); Simmons v. United States, 390 U.S. 377 (1968), Foster v. California, 394 U.S. 440 (1969); Coleman v. Alabama, 399 U.S. 1 (1970); and Neil v. Biggers, 409 U.S. 188 (1972), revg. in rel. pt. 448 F. 2d 91 (6th Cir. 1971).

The Court in Stovall first announced the due process standard to be used in examining pre-trial confrontations. There, the Court wrote, 388 U.S. at 301-302:

> "We turn now to the question of whether petitioner. . .is entitled to relief on his claim that in any event the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law."

The Court also stated that no per se rule would be established, rather that the inquiry must be based on the totality of the surrounding circumstances.

In Simmons v. United States, supra, the Court expanded the Stovall rule to photographic displays, and adopted the same standard although expressed slightly differently*, 390 U.S. at 384:

> "Instead we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pre-trial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."



* That there is no difference between the Stovall and Simmons standard has been expressed by the Court in Simmons, supra, 390 U.S. at 384: "This standard accords with our resolution of a similar issue in Stovall v. Denno, 388 U.S. 293, 301-302. . ."

Based on this standard, it appears that before identification testimony will be excluded, a two-step inquiry is required, was the identification procedure unnecessarily or impermissibly suggestive, and if so, did it give rise to a very substantial likelihood of irreparable misidentification. These must be considered separately. U.S. ex rel. Phipps v. Follette, 428 F. 2d 912 (2nd Cir. 1970). In Phipps, which along with Clemons v. United States, 408 F. 2d 1230 (D.C. Cir. 1968), serve as the leading exposition of the required inquiry (See Neil v. Biggers, 409 U.S. 188 (1972), the Court wrote (428 F. 2d at 914-5):

> "As was recognized by all the judges in [Clemons] and by the state judge here, the required inquiry is two-pronged. The first question is whether the initial identification procedure was 'unnecessarily'. . . or 'impermissibly' suggestive. If it is found to have been so, the court must then proceed to the question whether the procedure found to be 'unnecessarily' or 'impermissibly' suggestive was so conducive to irreparable mistaken identification [Stovall] or had such a tendency 'to give rise to a very substantial likelihood of irreparable misidentification' [Simmons] that allowing the witness to make an in-court identification would be a denial of due process."

As noted both then, and subsequently, the only Supreme Court decision to rule out an in-court identification on such a basis was Foster v. California, 394 U.S. 440 (1969).

However, as the Court subsequently made clear, in Neil v. Biggers, supra, the determination of whether or not the out of court identification is inadmissible also involves almost the same inquiry. After discussing the former Supreme Court decisions in the area, the Court in Neil, supra stated (409 U.S. at 198):

> "Some general guidelines emerge from these cases as to the relationship between suggestiveness and misidentification. It is, first of all, apparent that the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification'. Simmons v. United States, 390 U.s. at 384. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself."

See United States v. Kaylor, 491 F. 2d 1127 (2d Cir. 1973); United States v. Henderson, 489 F. 2d 802 (5th Cir. 1973); United States ex rel. Cannon v. Montanye, 486 F. 2d 263 (2d Cir. 1973); United States v. Evans, 484 F. 2d 1178 (2d Cir. 1973); United States ex rel. Gonzalez v. Zelker, 477 F. 2d 797 (2d Cir. 1973).

In Kaylor, supra, this Court wrote, 491 F. 2d at 1131:

> "A showup is not per se inadmissible or violative of due process, depending rather on the totality of the circumstances."

Similarly, in U.S. ex rel. Cannon v. Montanye, 486 F. 2d 263, 267, the Court wrote:

> "However, even a finding of unnecessary suggestiveness need not require the exclusion of identification evidence. One must then assess the likelihood of misidentification. . ."

See also, id., n. 8 at 267.

Similarly, in Gonzalez, supra, the Court relying on U.S. ex rel. Carter v. Mancusi, 342 F. Supp. 1356 (S.D.N.Y. 1971), affd. 460 F. 2d 1406 (2d Cir. 1972), upheld the in-court identification even though it found an out-of-court identification impermissibly suggestive. 477 F. 2d at 802.

Having thus outlined the nature of the inquiry, an examination of the relevant surrounding circumstances mandates a conclusion that neither the showup nor the in-court identification violated petitioner's constitutional rights.

A. The Pre-Wade Showup, conducted in a then acceptable manner did not create a very substantial risk of misidentification

In determining whether a pre-trial showup violated petitioner's constitutional rights to due process, under all the circumstances, several factors must be examined by the Court. In Neil v. Biggers, supra, the Court wrote (409 U.S. 199):

> "We turn, then, to the central question, whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidtification include the opportunity of the witness to view the criminal at the time of trial, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and confrontation."

Petitioner apparently concedes that the two hour confrontation between Chambliss and petitioner during the ordeal is more than a mere "fleeting glance" through the headlights of a passing car. See Coleman v. Alabama, supra, 399 U.S. at 4. He argues, however, that the opportunity to view petitioner was diminished because of the consumption of alcoholic beverages, the smoking of marijuana, the taking of two pills and his impaired vision in one eye. These complaints are unsupported in the record and without basis. While petitioner

suffered from a deteriorating condition in one eye and had just come through an eye operation, there is nothing in the record that demonstrates that his vision was in any way impaired or that he was unable to see his assailant. Indeed, Chambliss, using only his left eye, while not able to read, "could see well enough to distinguish the difference between things. . . and people and whatnot." (586-7). Insofar as the question of consumption of sleeping pills was concerned, the record is devoid of evidence to show that the two pills were, in fact sleeping pills. It was only that both Chambliss and petitioner thought they were sleeping pills (548-550). While Chambliss testified that he had consumed two glasses of wine and some whiskey, Dr. Caldwell testified that even after consuming "the large glass" of whiskey, Chambliss was both ambulatory and in possession of his faculties. Finally, petitioner argues without any support in the record that during the crucial minutes when petitioner was engaged in his rampage, the only eye out of which Chambliss could see was his impaired left eye. The record belies this assertion by the graphic and complete description



* The conclusion that he did not take sleeping pills is further supported by the autopsy of Jackson, who consumed a pill from the same pillbox and at the same time as Chambliss. In the course of the autopsy. Dr. Baden found no narcotics or barbiturates in the body. See p. 23, supra.

of petitioner's course of conduct, and because of Chambliss' clear distinction on the stand as to what he saw, what he heard and what he felt. Moreover, even before petitioner was told to face toward the wall, he had more than ample opportunity to observe petitioner. Petitioner also expressly stated that at that time he could see out of both eyes (584).

Thus, we are left with the conclusion that Chambliss, who met petitioner on the street, sat facing him for 15 minutes, not seven feet away, saw petitioner enter the room carrying a gun, watched him, as petitioner ordered Jackson to undress and get in bed, watched him as petitioner bound Jackson, can scarcely be said to not have had ample opportunity to observe him, under conditions so bizarre as to indelibly impress his image on petitioner's brain.

Petitioner clearly also had adequate, if not compelling motivation to pay considerably more attention to petitioner than would a casual observer. As Judge Friendly

wrote in U.S. ex rel. Phipps v. Follette, supra, 428 F. 2d at 915:

> "[M]uch will depend on. . .whether . . .[the witness] was motivated to make a careful observation of the perpetrator. A person unaware that a crime is being committed. . ., or even a bystander who knew that one had been, would have less of a desire to seek out and retain such an image than would the victim."

And as Mr. Justice Powell wrote of the rape victim in Neil v. Biggers, supra, 409 U.S. at 200:

> "She was no casual observer, but rather the victim of one of the most personally humiliating of all crimes."

See also Haberstroh v. Montanye, 493 F. 2d 483, 484 (2d Cir. 1974); U.S. ex rel. Gonzalez v. Zelker, supra, 477 F. 2d at 801; U.S. ex rel. Smiley v. LaVallee, 473 F. 2d 682 (2d Cir. 1973); U.S. ex rel. Bisordi v. LaVallee, 461 F. 2d 1020 (2d Cir. 1972); U.S. ex rel. Cummings v. Zelker, 455 F. 2d 714 (2d Cir. 1972). Thus, the second factor, motive to observe, is also manifest in the instant case.

With the exception of time (six weeks duration), all of the remaining factors also work to defeat petitioner's assertion of "suggestive confrontation creating a substantial risk of misidentification." Petitioner, still suffering the shock

of the rather bizarre incidents of the morning of May 28, 1966, was, nevertheless able to describe petitioner while not in a manner "sufficient to satisfy Proust", it nevertheless was reasonably accurate under the circumstances. Neil v. Biggers, supra; U.S. ex rel. Gonzalez v. Zelker, supra, 477 F. 2d at 802; U.S. ex rel. Bisordi v. LaVallee, supra, 461 F. 2d at 1024-5.

Petitioner makes much of the fact that Chambliss failed to notice petitioner's scars or the fact that his nose appeared badly misshapen. The description of petitioner, except for this point tallies with that of petitioner, and the composite picture drawn on the basis of Chambliss' description must, of necessity, been the police's principal evidence in ferretting out the suspect. The record, interestingly enough, is devoid of evidence to explain why Chambliss, who saw the scars and misshapen nose at the showup, still identified him as the assailant. The only explanation was that during the time the crime was committed, he was, in his own words, "scared".

The record also demonstrate that Chambliss was, at the time of the showup both careful to avoid hints of suggestiveness on the part of the police and after observing the victim for a ten minute period, made a positive identification -- an identification which, incidentally, withstood a blister-

ing cross-examination lasting over two days.* Moreover, the record shows that, at no point did he fail to identify petitioner as the assailant, nor at any time did he identify any other suspect as his assailant. It is thus clear, as the trial court implicitly found and as the District Court held, the identification procedure, while not the best available, was not engendered by bad faith on the part of the police**, and did not give rise to a very substantial likelihood of misidentification. See Roper v. Beto, 454 F. 2d 499 (5th Cir. 1972). The mere passage of time does not create any kind of presumption with regard to a showup. Thus, in Neil v. Biggers, the challenged identification took place seven months after the crime; and this Court, in U.S. ex rel. Carneigie v. McDougall, 422 F. 2d 353 (1970), cert. den. 398 U.S. 912 approved a showup three months after the incident. See discussion in Stanley v. Cox, 486 F. 2d at 52.



* See U.S. ex rel. John v. Casscles, 489 F. 2d 20, 26 (2d Cir. 1973); U.S. ex rel. Rutherford v. Deegan, 406 F. 2d 217 (2d Cir. 1969).

** Neil v. Biggers, supra, 409 U.S. at 199; U.S. ex rel. Phipps v. Zelker, supra, n. 3 at 914-5; Stanley v. Cox, 486 F. 2d 48, 51 (5th Cir. 1973); United States v. Kaylor, supra, 491 F. 2d at 1131.

Finally, the likelihood of misidentification is rendered less likely by the independent evidence linking petitioner with the crime. After petitioner was identified by Chambliss, petitioner in the course of a conversation with his cellmate, Eugene Griffin admitted complicity in the crime. Griffin testified without contradiction as to the details of the crime, unknown to Griffin and tallying exactly with the events related by Chambliss. See pp. 18-19, supra. As the Court stated in Phipps, supra, 428 F. 2d at 916:

> "We are fortified in affirming the denial of the writ by the abundant other evidence that Phipps was the right man."

See U.S. ex rel. Springle v. Follette, 435 F. 2d 1380, 1384 (2d Cir. 1970), cert. den. 401 U.S. 980 (1971); U.S. ex rel. Gonzalez v. Zelker, supra, 477 F. 2d at 803.*

B. The In-Court Identification was not a tainted one

Petitioner also argues from the premise that because the showup was per se suggestive (Compare, U.S. ex rel. Anderson v. Mancusi, 413 F. 2d 1012 [2d Cir. 1969]), the in-court identification was tainted. As was stated in Neil v. Biggers, supra,



* Petitioner also argues that as Chambliss viewed the showup with another witness, it was further rendered suggestive. The simple answer to this assertion is that while the other witness was present at the police station at the same time, Chambliss did not recall viewing petitioner at the same time, nor at any time having a conversation with him.

the question in such a circumstances is whether the showup was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Stovall v. Denno, supra. The parameters of the inquiry are the same -- to determine whether before the suggestive showup and its consequent imprint "there was already such a definite image in the witness' mind that he is able to rely [on his view at the scene] without much, if any, assistance from its successor." U.S. ex rel. Phipps v. Follette, supra, 428 F. 2d at 915. Again, the same factors, must be considered: opportunity, motivation, time lapse, quick and sure identification and prior descriptions must be considered. If, as has been shown, the showup procedure did not give rise to the very substantial likelihood of misidentification necessary to warrant its suppression, then a fortiori, it did not give rise to a substantial likelihood of irreparable misidentification. See U.S. ex rel. Carter v. Mancusi, supra; United States v. Henderson, supra.

In this case, the factors considered in Point IA, supra, even more clearly mandates that Chambliss' in-court identification did not deprive petitioner of due process.*

## POINT II

### PETITIONER'S REMAINING ASSIGNMENTS OF ERROR ARE NEITHER MERITORIOUS NOR COGNIZABLE IN A FEDERAL HABEAS CORPUS PROCEEDING.

Petitioner, for his remaining points raises two arguments concerning his conviction, first, that petitioner's right to testify was infringed upon by the Court's refusal to make a preliminary ruling on which if any of his prior convictions could be used to impeach him. Such an argument is supported neither by law or fact. For his second point, petitioner argues that the trial court deprived petitioner of the rights to counsel and equal protection of the laws, when it refused to permit a lie detector test to be taken. Again, petitioner cites no authority for this rather unique proposition.



* This subpoint, assumes arguendo, of course, that the Court finds the out-of-court identification violative of petitioner's due process rights. Proceeding on this assumption, it is also clear as was intimated in Gilbert v. California, 388 U.S. 263, 272 (1967), the error was harmless beyond a reasonable doubt, considering the record as a whole. Chapman v. California, 386 U.S. 18(1967); Schneble v. Florida, 405 U.S. 427, 432(1972); Milton v. Wainwright, 407 U.S. 371, 375 (1972). Petitioner's argument on this score is that it contributed to the jury's assessment of Chambliss' credibility because Chambliss, could not, at the time of trial, distinguish between nine feet and twenty feet is deceptive. It is well settled that the consequences of monocular vision include impairment of depth perception.

These points will be dealt with seriatim.

A.

There was no error in the Court refusing to make the preliminary determination complained of.

Prior to the commencement of trial, petitioner, relying on Luck v. United States, 348 F. 2d 768 (D.C. Cir. 1965) asked the Court to make a preliminary determination of which, if any, of petitioner's prior conviction, should be suppressed. The Court, quite properly and in the exercise of its discretion, refused to rule on the matter at that time, stating however (6):

> ". . .And to possibly assist you in your thinking on that subject, the Court is inclined to allow latitude to the District Attorney in his cross-examination of the defendant who becomes a witness, if he becomes a witness. And once he becomes a witness, then he has changed his status."

The Court then suggested, that at the appropriate time, counsel could renew the application and that it would considered at that time. So far as the record reveals, no such application was made. Thus, petitioner's argument that his right to testify was "burdened" is unsupported by the record, for a motion made at the appropriate time for suppression of prior convictions might have resulted in the desired result. As petitioner chose not to take the stand nor renew the application, the motion was at best, hypothetical and not pursued.

More importantly, the Court, unlike the District Court in Luck was under no obligation to make any such preliminary ruling.* The extent to which prior convictions may be used to impeach a witness is, at best, addressed to the judge's discretion, certainly a refusal to rule preliminarily cannot be gainsaid to rise to the level of constitutional significance. United States v. Palumbo, 401 F. 2d 270, 274 (2d Cir. 1968). If the question is not one of constitutional dimension then certainly it is not cognizable in a federal habeas corpus proceeding. Milton v. Wainwright, supra, 407 U.S. at 377:

> "The writ of habeas corpus has limited scope; the federal courts do not sit to re-try cases de novo but, rather to review for violation of federal constitutional standards."

As United States v. Puco, 453 F. 2d 539 (2d Cir. 1971) makes clear, the trial judge has the discretion to make such a ruling, a defendant has no constitutional right to any such a preliminary determination.

Consequently, this point must fail.



* Indeed, it is not at all clear from Luck, supra that in the absence of statute, any court is so obligated.

B.

The Court's Refusal to allow petitioner to take a lie detector test deprived him of no constitutional rights and certainly did not affect his conviction.

Petitioner's final point may also be summarily disposed of. In substance, he argues that because his counsel was not permitted to us "an investigative tool", the polygraph, on petitioner was deprived of the right to counsel, and because others not in jail would have been permitted to, on their own initiative take a polygraph examination, he was deprived of the equal protection of the law. There is no support for either such proposition, and in any event as there is nothing to indicate (aside from counsel's speculation as to what is done in other jurisdictions, but most notably not in New York County) that there is any nexus between the conviction and the failure to permit petitioner to take a lie detector test. While a polygraph is useful to the prosecution in many instances in making a decision to prosecute, it is unclear how the polygraph is useful to defense counsel, when it is used by him on a defendant, once the decision to prosecute is made, unless, of course, it is admissible in evidence. See Note, "The Emergence of the Polygraph at Trial", 73 Col. L. Rev., 1120 (1973).

An appeal to the prosecutor's discretion as to whether or not to prosecute, assumes two points, first, that the polygraph results would have been favorable, and second, that the District Attorney would have accepted them. Neither of these assumptions are extant herein.

Petitioner's second point -- that he would have been able to convince the trial court, notwithstanding People v. Forte, 279 N.Y. 204 (1938) to receive the polygraph in evidence -- is also without merit. The New York courts have uniformly refused to admit the polygraph evidence prior to that time, and in People v. Leone, supra, decided well after the trial in this case, the New York Court of Appeals held (25 N Y 2d at 518):

> "We are all aware of the tremendous weight which such tests would necessarily have in the minds of a jury. Thus, we should be most careful in admitting into evidence the results of such tests unless their reasonable accuracy and general scientific acceptance are clearly recognized."

The Court, after noting that many of the commentators urging support for the use of lie detectors have something more than an aesthetic interest in the search for truth, found that these tests are not yet sufficiently reliable to enable the Court to make use of them. See United States v. Zeiger, ___F. 2d____, 12 Crim. L. Rep. 2135 (D.C. Cir. 1972), reversing United States v. Zeiger, 350 F. Supp. 685 (D.D.C. 1972).

Consequently, there is no basis for petitioner's argument on this point, and it too, must fail. Wong Sun v. United States, 371 U.S. 471 (1963); U.S. ex rel. Orsini v. Reincke, 286 F. Supp. 974 (D. Conn. 1968), affd. 397 F. 2d 977 (2d Cir. 1968).

## CONCLUSION

THE DETERMINATION OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Dated: New York, New York
June 19, 1974

Respectfully submitted,

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STATE OF NEW YORK )
: SS.:
COUNTY OF NEW YORK )

BERNADETTE MERLINO, being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellee herein. On the 19th day of June, 1974, she served the annexed upon the following named person :

WILLIAM C. PELSTER, ESQ.
30 Rockefeller Plaza
New York, N.Y. 10020

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Bernadette Merlino

Sworn to before me this
19th day of June, 1974

Assistant Attorney General
of the State of New York